
UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF TEXAS

BONNIE BURNETTE ERWIN,

Plaintiff,

versus

UNITED STATES OF AMERICA, *et al.*,

Defendants.

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CIVIL ACTION NO. 1:19-CV-375

**ORDER PARTIALLY ADOPTING THE
MAGISTRATE JUDGE’S REPORTS AND RECOMMENDATIONS**

Plaintiff Bonnie Burnette Erwin, a prisoner proceeding *in forma pauperis*, filed this civil rights action pursuant to *Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), 42 U.S.C. § 1983, the Federal Tort Claims Act (FTCA), and the Americans with Disabilities Act (ADA) against the United States of America, Jeff Baney, James T. Jack, J.F. Caraway, Mark Inch, Dallas Jones, Clint Sonnier, Dr. Luis Ramos, League Medical Concepts, FNU Croddack, Tikisha Provost, and T. Pike.

The court referred this matter to the Honorable Zack Hawthorn, United States Magistrate Judge, at Beaumont, Texas, for consideration pursuant to applicable laws and orders of this court. The magistrate judge recommended granting the motion to dismiss filed by League Medical Concepts and Defendant Ramos. The magistrate judge also recommended granting the motion to dismiss filed by the United States of America and Defendants who are employed by the government.

The court has received and considered the Reports and Recommendations of United States Magistrate Judge, along with the record, pleadings, and all available evidence. Plaintiff filed objections to the magistrate judge's Reports and Recommendations.

The court has conducted a *de novo* review of the objections in relation to the pleadings and the applicable law. *See* FED. R. CIV. P. 72(b). For the reasons stated in the magistrate judge's report and recommendation, League Medical Concepts and Defendant Ramos should be dismissed from this action. The *Bivens* claims against the individual government employee defendants should be dismissed because Plaintiff failed to exhaust administrative remedies with respect to those claims. With the exception of Plaintiff's claim that he suffered an injury when he was left at the federal prison in Beaumont during Hurricane Harvey, Plaintiff's FTCA claims are also unexhausted. Plaintiff should be allowed to proceed with his exhausted FTCA claim and all other claims should be dismissed. Because the United States of America is the only proper defendant in an FTCA action, the individual defendants must be dismissed. *Galvin v. Occupational Safety & Health Admin.*, 860 F.2d 181, 183 (5th Cir. 1988).

The government employee Defendants and the United States of America moved to dismiss this action pursuant to Federal Rule of Civil Procedure 12(b)(5) due to Plaintiff's failure to properly serve them. Plaintiff claims that the court is responsible for serving the defendants because he is proceeding *in forma pauperis*. In fact, Plaintiff is barred from proceeding *in forma pauperis* because he has accumulated three "strikes" and has not demonstrated that he was in imminent danger of serious physical injury at the time he filed this action. *See Erwin v. Smith*, No. 04-40032, 103 F. App'x 854 (5th Cir. 2004) (affirming the district court's dismissal of the complaint as frivolous and imposing a second strike by dismissing the appeal as frivolous); *Erwin*

v. Sanders, No. 1:95-CV-1427 (D.D.C. July 31, 1995) (dismissing action as frivolous). As a paying litigant, Plaintiff is responsible for serving the defendants, and he failed to properly serve them in accordance with Federal Rule of Civil Procedure 4(m). Although Defendants move for dismissal pursuant to Federal Rule of Civil Procedure 12(b)(5), the court is of the opinion that Plaintiff should be given an extension of time to serve the United States of America, the only Defendant remaining in this action.

ORDER

Accordingly, Plaintiff's objections (#45) are **OVERRULED**, in part. The magistrate judge's reports and recommendations (#42 and #43) are **ADOPTED** to the extent that all claims and Defendants are **DISMISSED**, except the FTCA claim concerning Hurricane Harvey against the United States of America. Plaintiff shall have thirty days from the date of this order in which to serve the United States of America in accordance with Rule 4.

SIGNED at Beaumont, Texas, this 1st day of May, 2024.



MARCIA A. CRONE
UNITED STATES DISTRICT JUDGE